North Dakota Attorney General's LAW REPORT

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SEARCH WARRANT – WAITING TIME BEFORE ENTRY

In *United States v. Banks*, ___ U.S. ___ (2003), the court reversed a circuit court's order suppressing evidence found after execution of a search warrant.

Officers obtained a search warrant to search the defendant's apartment. Arriving mid-afternoon, officers in front of the apartment called out "police search warrant" and rapped hard enough on the door to be heard by officers at the back door. There was no indication whether anyone was home and, after waiting for 15 to 20 seconds with no answer, the officers broke open the front door with a battering ram. The defendant was in the shower and testified that he had heard nothing until the crash of the door. The search produced weapons, crack cocaine, and other evidence of drug dealing.

Reversing his conviction, the Ninth Circuit Court of Appeals ordered suppression of the evidence found in the search, setting forth numerous factors to be considered by officers in deciding when to enter premises identified in the warrant after knocking and announcing their presence but receiving no express acknowledgment. The appeals court concluded that under the facts of this case, the forced entry by destruction of property was permissible only if there was an explicit refusal of admittance or if the officers waited for a time longer than 15 to 20 seconds before forcibly entering the residence.

The Supreme Court granted certiorari to consider how to go about applying the standard of reasonableness in a felony case to the length of time police with a warrant must wait before entering without permission after knocking and announcing their intent.

The court noted that there was no dispute that the officers were obliged to knock and announce their intentions when executing the search warrant.

The Fourth Amendment says nothing specific about formalities in exercising a warrant's authorization. It speaks to the manner of searching as well as to the legitimacy of searching in the terms of the right to be secure against unreasonable searches and seizures. The reasonableness of the execution of a search warrant has been treated by the court as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality-of-circumstances in the given case. The court recognized that is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance and without inflating marginal ones. The court has not adopted bright-line rules but, instead, emphasized the fact-specific nature of the reasonableness inquiry.

The common law knock-and-announce principle is one focus of the reasonableness inquiry. Although the standard generally requires the police to announce their intent to search before entering closed premises, the obligation gives way when officers have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile or would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigencies already exists or will arise instantly upon knocking, a magistrate judge is acting within the constitution to authorize a "no-knock" entry. Even when executing a warrant silent about that, if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, the officers may go straight in.

Since most people keep their doors locked, entering without knocking will normally do some damage, a circumstance too common to require a heightened justification when a reasonable suspicion of exigency already justifies an unwarned entry. The court has held that in exigent circumstances, police may damage premises so far as necessary for a no-knock entrance without demonstrating the suspected risk in any more detail than the law demands for an unannounced intrusion simply by lifting the latch. Either way, it is enough that the officers had a reasonable suspicion of exigent circumstances.

This case turned on the significance of exigency revealed by circumstances known to the officers. Although the officers concededly arrived at the defendant's door without a reasonable suspicion of facts justifying a no-knock entry, they argued that announcing their presence started the clock running toward the moment of apprehension and that the defendant would flush away the easily disposable cocaine prompted by knowing the police would soon be coming in.

The defendant did not deny that exigency may develop in the period beginning when officers with a warrant knocked to be admitted. The issue comes down to whether it was reasonable to suspect imminent loss of evidence after the 15 to 20 seconds the officers waited prior to forcing their entry. Although this call may be a close one, the court believed that after 15 or 20 seconds without a response, the officers could fairly suspect that cocaine would be gone if they waited any longer.

The fact that the defendant was in the shower and did not hear the officers is not to the point, and the same is true of the defendant's claim that it might have taken him longer than 20 seconds if he had heard the knock and headed straight for the door. As for the shower, it is enough to say that the facts known to the police are what count in judging reasonable waiting time, with the reasonableness of a particular use of force being judged from the perspective of a reasonable officer on the scene rather than with 20/20 vision of hindsight. There was no indication that the police knew that the defendant was in the shower and unaware of an impending search that he would have otherwise have tried to frustrate.

The argument that 15 to 20 seconds was too short for the defendant to have come to the door ignores the very risk that justified prompt entry. If the officers were to justify their timing by claiming that the defendant's failure to admit them fairly suggested a refusal to let them in, the defendant could at least argue that no such suspicion can arise until an occupant has had time to get to the door, a time that will vary with the size of the establishment, perhaps five seconds to open a motel room door, or several minutes to move through a townhouse.

In this case, the police claimed exigent need to enter and the crucial fact in examining their actions is not time to reach the door but the particular exigency claimed. What matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain. When circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter. Since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow or an apartment like the defendant's. Fifteen to 20 seconds did not seem an unreasonable guess about the time someone would need to get in a position to rid his quarters of cocaine.

Once the exigency had matured, the officers were not bound to learn anything more or wait any longer before going in, even though their entry entailed some harm to the building.

In common law, the knock-and-announce rule was traditionally justified in part by the belief that announcement generally would avoid the destruction or breaking of any house and to prevent damage. One point in making an officer knock and announce is to give a person inside the chance to save his door. That is why, in a case with no reason to suspect an immediate risk of frustration or futility in waiting, the reasonable wait time may well be longer when the police make a forced entry, since they ought to be more certain the occupant has had time to answer the door. It is hard to be more definite than that without turning the notion of a reasonable time under all the circumstances into a set of sub-rules as the appellate court was inclined to do. The need to damage property in the course of getting in is a good reason to require more patience than it would be reasonable to expect if the door were open. Police seeking a stolen piano may be able to spend more time to make sure that they really need the battering ram.

The demand for enhanced evidence of exigency before a door can reasonably be damaged by a warranted no-knock intrusion was already bad law before the court of appeals decided this case. The court had previously rejected attempts to sub-divide felony cases by accepting "mild exigency" for entry without property damage but requiring more specific inferences of exigency before damage could be reasonable. The reasonableness analysis cannot involve pigeonholing the facts by distorting the "totality-of-the-circumstances" principle. Attention to cocaine rocks and pianos tells a lot about the chances of their respective disposal and its bearing on reasonable time.

PROBABLE CAUSE – ARREST – VEHICLE OCCUPANTS

In *Maryland v. Pringle*, ____ U.S. ___ (2003), the court upheld the warrantless arrest of occupants of a motor vehicle for possession of cocaine.

In the early morning hours, a passenger car occupied by three men was stopped by a police office for speeding. The defendant was a front-seat passenger with one other passenger in the back seat. The driver was given an oral warning but was asked if he would consent to a search of the vehicle. After receiving the consent, $763 was found in the glove box and five plastic glassine baggies of cocaine were discovered when a back-seat armrest was pulled down by the officer.

The officer questioned all three men about the ownership of the drugs and money and told them that if no one admitted to ownership of the drugs, he was going to arrest them all. No information regarding the ownership of the drugs or money was provided by the three individuals and they were placed under arrest.

Later that morning, Pringle confessed that the cocaine belonged to him and maintained that the other occupants of the car did not know about the drugs. The other occupants were released.

The Maryland Court of Appeals reversed the defendant's conviction of possession with intent to distribute and possession of cocaine concluding that finding the cocaine in the back armrest when the defendant was a front-seat passenger in a car driven by the owner was insufficient to establish probable cause for an arrest for possession.

It was uncontested that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed. The only question to be resolved by the court was whether the officer had probable cause to believe the defendant had committed that crime.

The court restated its earlier pronouncements that probable cause is a practical, nontechnical conception that deals with the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. Probable cause is a fluid concept turning on the assessment of probabilities and particular factual context not readily, or even usefully, reduced to a neat set of legal rules. The probable cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality-of-the-circumstances. The substance of all definitions of probable cause is a reasonable ground for belief of guilt and that the belief of guilt must be particularized with respect to the person to be searched or seized.

To determine whether an officer had probable cause to arrest an individual, the court examines the events leading up to the arrest and then decides whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause.

The defendant was one of three men riding in a vehicle at 3:16 a.m. There was $763 of rolled up cash in the glove compartment directly in front of the defendant. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three individuals. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money. Based upon these facts, the court found it entirely reasonable to infer from these facts that any or all of the occupants had knowledge of, and exercised dominion and control over, the cocaine. A reasonable officer could conclude that there was probable cause to believe the defendant committed the crime of possession of cocaine, either solely or jointly. The arrest was valid.

The court rejected the defendant's claim that the case was one of guilt-by-association, relying upon Ybarra v. Illinois, 444 U.S. 85 (1979) and United States v. Di Re, 332 U.S. 581 (1948). In Ybarra, police officers searched a tavern pursuant to a search warrant but also conducted a pat down search of the customers present in the tavern. The court held that the search warrant did not permit body searches of all the tavern's patrons and the police could not pat down the patrons for weapons, absent individualized suspicion. This case is different than Ybarra. The defendant and his two companions were in a relatively small automobile and not a public tavern. A car passenger, unlike an unwitting tavern patron, often will be engaged in common enterprise with the driver and has the same interest in concealing the fruits or evidence of their wrongdoing. The court found it reasonable for the officer to infer a common enterprise among the three occupants of the vehicle.

In Di Re, an informant identified a person by the name of Reed engaging in criminal activity. Reed was seated in the back seat of a vehicle with the driver and Di Re seated in the front. Officer's arrested all three occupants. The arrest of Di Re was overturned by the court because the officer had no information pointing to Di Re's criminal activity and lacked probable cause to believe he was involved in the crime. Any reference that everyone on the scene of a crime is a party to it must disappear if a government informant singles out the guilty person. In this case, the defendant was not singled out. Rather, none of the three men provided information with respect to the ownership of the cocaine or money in the vehicle. The officer had probable cause to believe the defendant had committed the crime of possession of a controlled substance, and the defendant's arrest was lawful.

SEARCH WARRANT –
CLAIM OF FALSE OR MISLEADING INFORMATION IN AFFIDAVIT

In *State v. Ballweg*, 2003 ND 153, 670 N.W.2d 490, the court affirmed the defendant's conviction of manufacturing methamphetamine.

On April 9, 2002, a search warrant was issued for the defendant's premises. The affidavit contained information regarding events which occurred between March 2 and April 9, 2002. A deputy stated that on March 2, Nekoma Farmers Elevator reported a full

anhydrous tank was missing from its inventory and was assumed stolen. On March 11, the elevator reported someone had seen the anhydrous tank in the defendant's yard.

Deputies went to the defendant's farmyard and the defendant appeared to be "very nervous." The defendant told the officers that he received the anhydrous tank the previous fall and never used it on his crops because it snowed. Officers looked at the tank and noticed its gauge read 86% and appeared to have been present for a while since there were no fresh tracks around. The defendant stated that he used the anhydrous to gas some rats in the farm and could not remember whether he picked the tank up from the elevator or whether it had been delivered. When leaving the farm, the deputies noticed a garage on the property had its windows boarded up, its door padlocked from the outside, and one side completely covered with a blue tarp, which made the officers suspicious to why it was concealed so no one could look inside it.

A deputy also informed the court that after leaving the farmyard, he went to the Nekoma Elevator to speak with an employee there and the employee stated there was no record of the tank being removed from the elevator and explained the process used for keeping track of tanks. The deputy also stated that anhydrous ammonia was a key ingredient in the manufacture of methamphetamine.

The deputy later talked with the defendant's father, who stated they received the tank in October but did not apply the anhydrous because of snow.

On April 7, 2002, the deputy received a report that the defendant bought items used in the process of making methamphetamine from a Wal-Mart. The defendant purchased three boxes of Sudafed, two packages of four AA lithium batteries, two packages of nonlatex rubber gloves, one package of latex gloves, and two boxes of baking soda, which the deputy explained are all used for the methamphetamine manufacturing process. The affidavit also included information from a highway patrolman who had followed a suspicious vehicle registered to Chad Lee into the defendant's yard at 2 a.m. The deputy discovered that Lee recently got off probation for felony possession of methamphetamine and misdemeanor possession of marijuana. The deputy also described the defendant's farmstead including buildings capable of housing a meth lab at three different locations. The trial court denied the defendant's motion to suppress evidence seized during the search.

In affirming the defendant's conviction and the denial of the suppression motion, the court recognized that the totality-of-the-circumstances test is used to determine whether sufficient evidence was presented to a magistrate to establish probable cause independent of the trial court's findings. The magistrate evaluates all the evidence and makes a practical, common sense decision whether probable cause exists to search a particular place. The Supreme Court will generally defer to a magistrate's determination of probable cause so long as there is a substantial basis for the conclusion and doubtful or marginal cases should be resolved in the favor of the magistrate's determination.

The defendant claims that the deputy's affidavit did not establish probable cause but contained information that was misleading, conclusory, and described normal, everyday conduct.

The defendant asserted that the affidavit was misleading because it falsely implied the anhydrous tank was stolen even though the deputy knew before he submitted the affidavit that the tank had not actually been stolen. The defendant relied on Franks v. Delaware, 438 U.S. 154 (1978), asserting that the deputy's statements were misleading by omission. The court noted, however, that negligent or innocent mistakes are not enough to establish reckless or deliberate falsity and the alleged misleading facts must affect the magistrate's determination of probable cause. Whether there is reckless or deliberate falsity is a finding of fact and is reviewed under the clearly erroneous standard.

The defendant's contention that the statements regarding the anhydrous tank were misleading did not withstand review. At the suppression hearing, the deputy testified that the tank ended up in the defendant's yard by mistake and he reached this conclusion before he applied for the search warrant. He concluded there was a mistake regarding the anhydrous tank because the defendant was never charged with theft. The fact that the defendant was not charged with stealing the tank does not necessarily mean he possessed it legally, it could mean there was insufficient evidence to prosecute him. By recounting the report from the elevator and providing the defendant's explanation, the deputy presented the district judge with enough information to determine the significance of the tank in her probable cause analysis. He did not mislead the district judge with regard to the anhydrous tank. There was no reckless or deliberate falsity or omission which would require setting aside the statements regarding the anhydrous tank.

In addition, the fact the anhydrous tank may have been stolen is not material to the probable cause analysis in this case. Although the purpose for the anhydrous tank on the farm may have created greater suspicion had it been stolen, perhaps suggesting it would be used for an illegal purpose, the material fact regarding the anhydrous was its availability when considered with the items purchased at the Wal-Mart. Anhydrous is one ingredient needed to make methamphetamine that is not available in stores. The fact the anhydrous tank may have been stolen was not necessary to finding probable cause to search the premises but the

availability of the anhydrous along with the other information presented in the affidavit was necessary.

Informing the district judge that the defendant was not going to be charged with stealing the tank would not have negated probable cause in this case because there would still have been information establishing the defendant had access to anhydrous. The information regarding the anhydrous tank was not misleading and was properly evaluated by the district judge insofar as there was neither reckless or deliberate falsity nor omitted information that would have eliminated probable cause.

The court also rejected the defendant's claim that the affidavit did not contain enough information regarding criminal activity to establish probable cause to search because it described normal, everyday conduct. The standard of proof necessary to establish guilt at trial is not necessary to establish probable cause. The relevant inquiry is not whether the conduct is innocent or guilty, but what degree of suspicion attaches to it. Circumstantial evidence may alone establish probable cause to support a search warrant.

Under the totality-of-the-circumstances, there was sufficient information presented to the district judge from which a person of reasonable caution could conclude evidence of a methamphetamine manufacturing operation would be found at the premises. Although the information in the affidavit describes innocent conduct when observed in a piecemeal fashion, the combination of the presence of anhydrous, the collective purchase of the large quantity of Sudafed and other supplies used in the process of manufacturing methamphetamine, and the condition of the garage, created a substantial basis for the district judge to conclude probable cause existed to search the premises.

FORFEITURE – RIGHT TO A JURY TRIAL – BURDEN OF PROOF

In *State v. $17,515.00 in Cash Money*, 2003 ND 168, 670 N.W.2d 826, the court held that no constitutional right to a jury trial existed for a forfeiture proceeding commenced under N.D.C.C. ch. 19-03.1.

The defendant asserted that a jury trial for a forfeiture proceeding was required under N.D. Const. art. I, § 13. The court recognized, however, that this provision neither enlarges nor restricts the right to a jury trial but merely preserves the right as it existed at the time of the adoption of the North Dakota Constitution. The provision preserves the right to a jury trial in all cases in which it could have been demanded as a matter of right at common law at the time of the adoption of the constitution. The right to a jury trial as it existed under law at the time of the adoption of the constitution is governed in this case by the Compiled Laws of Dakota Territory (1887).

At the time of the adoption of our constitution in 1889, no cause of action existed for forfeiture of the proceeds of illegal drug transactions. The defendant had not cited, nor had the court located, any provision in the 1887 code imposing a forfeiture for proceeds of illegal drug transactions. The Legislature enacted the current provisions authorizing forfeiture of money used in illegal drug transactions in 1983. Because there was no available action in this state for forfeiture of proceeds from illegal drug transactions at the time the constitution was adopted, there was no right to a jury trial in such an action. The forfeiture provisions of N.D.C.C. ch. 19-03.1 create a statutory proceeding and new remedies which were unknown at the time our constitution was adopted in 1889. There is no right under N.D. Const. art. I, § 13, to a jury trial in forfeiture proceedings under the statute.

The court also rejected the claim that the trial court applied an erroneous standard of proof and improperly placed the burden upon the claimant to show that the money was not derived from illegal drug transactions but required that the state had to prove by a preponderance of the evidence that the money was derived from such transactions.

The court noted that the Legislature had set forth a two-step process regarding the applicable standards and burdens of proof in a forfeiture proceeding. The government must first show probable cause to institute forfeiture proceedings and then the burden shifts to the claimant. Once the government has established a probable cause that the asset is forfeitable, the burden shifts to the claimant to prove by a preponderance of the evidence that the property should not be forfeited. The statute does not provide that, if the claimant comes forward with evidence tending to show that the property was not involved in illegal drug activity, the burden shifts back to the state to prove the property is forfeitable. Rather, the statute clearly provides that once the state establishes probable cause to believe the property is forfeitable, the ultimate burden of proof shifts to the claimant to prove by a preponderance of the evidence that the property is not forfeitable. That is the standard that was applied by the trial court in the case and it was not incorrectly applied.

OBVIOUS ERROR – CHARACTER EVIDENCE

In *State v. Beciraj*, 2003 ND 171, 670 N.W.2d 855, the court affirmed the defendant's conviction of conspiracy to commit arson. A fire broke out in the defendant's home. Neither the defendant nor his wife were home at the time. Fire investigators determined the origin of the fire was the north wall of the master bedroom. The

defendant was charged with conspiracy to commit arson and, prior to trial, was notified that the state intended to produce evidence under North Dakota Rule of Evidence 404(b).

The defendant moved to prevent the state from introducing evidence of a previous fire in a defendant's former home. The state argued it would use the evidence to show the defendant's knowledge that, after the former fire, he received money from the American Red Cross and the community. The defendant's motion was denied.

At trial, a fire investigator testified the trailer contained suspicious evidence, such as nearly empty closets with many empty hangers and pictures missing from picture frames. The fire investigator also testified that the defendant immediately explained that he had received money after the previous fire and asked where the donations from the Red Cross and the community would be and which bank would have them this time. The trial court sustained defendant's objections to certain testimony and overruled it as to other testimony. In closing arguments, the state made comments regarding the previous fire and the claims for the funds from the Red Cross and the community. The defendant's counsel did not object to these comments during the closing arguments and the defendant was found guilty.

On appeal, the defendant's only argument was that the state's comments in closing argument were obvious error. In this case, defense counsel did not preserve the issue for appeal by objecting to the state's comments, moving for a mistrial, or seeking a curative instruction from the trial court. The court will exercise its authority to notice obvious error cautiously and only in exceptional circumstances where the defendant has suffered serious injustice.

An obvious error is defined as a clear deviation from an applicable legal rule. On appeal, the defendant argued that the state made improper comments in its closing argument. Generally, the Supreme Court does not reverse a criminal conviction on the basis of inappropriate prosecutorial comments in closing argument unless the trial court clearly abused its discretion.

The court concluded that the trial court did not commit obvious error when it did not exclude the state's comments in closing argument regarding the prior fire. The state commented only on facts which a trial court had already admitted into evidence. The defendant did not appeal the evidentiary rulings on the testimony on which the state based its closing argument comments. During closing argument, a party may refer to any evidence submitted at trial. The trial court did not commit obvious error because the state's comments were based on admitted testimony and did not encompass any facts not admitted into evidence.

The court also discussed the admission of testimony regarding the prior home fire and the receipt of money by the defendant from the Red Cross and the community. Under North Dakota Rule of Evidence 404(b), the prosecution may not use the evidence to prove the character of a person in order to show conformity therewith. Evidence offered under this rule is subject to the test of Rule 403 which excludes relevant evidence if its probative value is substantially outweighed by its unfair prejudicial effect. Under Rule 404(b), evidence of knowledge or motive is admissible. The state's closing argument referred to evidence that had been properly admitted under 404(b) to show knowledge or motive for conspiracy to commit arson and the trial court did not commit error in excluding those comments. Evidence that the defendant discussed with the fire investigator receiving money from the Red Cross and the community when the previous fire destroyed his home and personal belongings establishes the defendant's knowledge that he will again receive money if another fire destroys his property. Such knowledge is highly probative of a financial motive to conspire to commit arson.

CONSPIRACY – ARSON – CANCELLED INSURANCE POLICY

In *State v. Beciraj*, 2003 ND 173, 671 N.W.2d 250, the court affirmed the defendant's conviction of conspiracy to commit arson. The defendant, the wife of the defendant in the previous case, argued that there was insufficient evidence to support the jury verdict of guilt because no evidence was presented to indicate she knew the mobile home destroyed by fire was insured. She also argued it was legally impossible for her to have committed arson because the insurance had been cancelled.

During trial, a fire investigator testified that the defendant's husband asked "where will the money be" and "which bank will the money be in." After further inquiry, the investigator found that the defendant's husband was referring to money donated from the Red Cross and the community. He testified that the defendant's husband told him he had insurance and knew his policy limits without looking. The defendant's husband had taken out an insurance policy on the home. The insurance agent testified that the defendant's husband also called to file an insurance claim on the day after the fire but that the insurance policy had been cancelled. A neighbor testified that the defendant and her husband had attempted to sell the home but the "for sale" sign was removed a few days before the fire. The neighbor also testified that the defendant told her that her home was for sale for "cash only" and that her husband needed money for business. Other testimony showed that the home had very little

bedding, the closets held many empty hangers, there was not enough silverware for a family of seven within the home, and picture frames were missing their pictures. Neighbors testified they witnessed the defendant carrying bags away from the home on the day of the fire that appeared to be filled with clothes and other household items.

In rejecting the defendant's claim that there was insufficient evidence to support her conviction, the court found substantial evidence to prove the elements of conspiracy to commit arson and to warrant a conviction. The evidence showed an agreement between the defendant and her husband and an overt act was committed. The defendant and her husband took out insurance a few months before the fire and, on the day of the fire, neighbors saw the defendant carrying bags of clothing and other household items away from the mobile home. The mobile home was left unlocked and none of the family was present at the time of the fire. The defendant's husband inquired about getting money from the community and knew the exact insurance limits on his policy. The evidence suggested that the defendant knew her husband needed money. Viewing the evidence most favorable to the verdict, the court concluded that the defendant's activities showed that she knew the home and its contents were insured and agreed with her husband to commit arson.

The court also rejected the defendant's claim that because her home was not insured, there was insufficient evidence to support the jury verdict of finding her guilty.

Construction of statutes is a question of law and therefore reviewable. N.D.C.C. § 12.1-06-04(1) requires for conspiracy that a person must agree to engage in conduct that, in fact, constitutes an offense. Conspiracy is limited to agreements to engage in a crime or crimes which are defined elsewhere.

N.D.C.C. § 12.1-21-01, the crime of arson, requires that a person start a fire to destroy or damage his own real property for the purpose of collecting insurance. The statute requires only that the actor start a fire with intent to destroy or damage his property for the purpose of collecting insurance for the loss. There is no statutory requirement that there actually be insurance. The evidence presented made clear that the defendant agreed to start a fire to destroy or damage her home. The evidence presented also made it clear that the purpose of this agreement was to collect insurance money.

There may be a conspiracy to commit arson even when, unknown to the conspirators, their insurance has lapsed or been cancelled.

INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO FILE APPEAL

In *Kamara v. State*, 2003 ND 179, ____ N.W.2d ____, the court affirmed the trial court's order denying Kamara's motion for post-conviction relief.

Kamara was tried and convicted for three drug related crimes. He filed a motion for post-conviction relief claiming ineffective assistance of his trial counsel for failing to file an appeal of the criminal judgments.

There was a factual dispute regarding whether, or to what extent, Kamara's trial counsel discussed appealing the convictions with him. Kamara stated that he indicated he wished to appeal when the jury announced its verdict. Kamara's trial counsel testified that he consulted with Kamara regarding an appeal when the jury was deliberating and Kamara indicated he did not wish to appeal. He also testified he consulted with Kamara regarding an appeal both before and after the sentencing hearing and Kamara again indicated he did not wish to appeal. The trial court found the attorney's testimony more believable than Kamara's and denied Kamara's petition for post-conviction relief.

To succeed on a claim of ineffective assistance of counsel, a person must show counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. This test applies to claims counsel was ineffective for failing to file a notice of appeal. There are three types of cases regarding counsel's failure to file a notice of appeal. First, a lawyer who disregards specific instructions to file a notice of appeal acts in a manner that is professionally unreasonable. Second, an attorney cannot be found to have performed deficiently by not filing an appeal when a defendant explicitly tells him not to do so. The final situation is when the defendant has not clearly conveyed his wishes one way or the other.

Although the Supreme Court's standard of review for a claim of ineffective assistance of counsel is a mixed question of law and fact, the trial court's findings of fact are subject to a clearly erroneous standard of review. The court will not second-guess the trial court's determination the trial counsel was more credible than Kamara and his other witness. The credibility of witnesses is left to the trial court to determine. There was evidence to support the trial court's order and the Supreme Court was not convinced that a mistake had been made.

DUI – REQUIREMENT OF CHEMICAL TEST

In *State v. Knowels*, 2003 ND 180, ___ N.W.2d ____, the court concluded that there was sufficient evidence to support the defendant's DUI conviction.

The defendant was arrested for DUI. Trial testimony established that he had been observed driving a vehicle that drifted into an oncoming lane of traffic and continued to weave. When stopped, the defendant had balance problems, bloodshot eyes, slurred speech, and smelled of alcohol. Alcohol was discovered in the vehicle and an officer confirmed that an alcohol smell was emanating from the vehicle's interior. The defendant presented evidence that although he had been drinking earlier, he had poor balance because of an injured back and a broken rib and his eyes were possibly bloodshot because he had recently awoken from a long sleep. The owner of the vehicle testified that the defendant did not have slurred speech or bloodshot eyes when he left with the vehicle, did not take beer with him, did not drink during dinner, and that the open containers found in the vehicle belonged to the vehicle's owner.

Although the defendant agreed to a preliminary breath test, he failed to blow into the machine as instructed and did not provide a sufficient sample, making the results questionable. No formal chemical testing measuring the defendant's blood alcohol content was performed. The defendant refused to submit to a blood test but argued that he made numerous requests for a breath test.

At trial, the only evidence of the defendant's intoxication was the officer's testimony recounting his observation of the defendant during the traffic stop and subsequent arrest. The defendant was convicted of DUI.

On appeal, the defendant argued there was insufficient evidence to convict him, primarily because there was no chemical analysis of his blood alcohol content. Rejecting this claim, the court noted that, under North Dakota law, a person maybe convicted of driving under the influence in one of two ways; a per se violation involving specific alcohol concentration, or a violation prohibiting the driving of a vehicle under the influence of intoxicating liquor that does not require a chemical test to support a conviction. This latter violation, driving while under the influence of intoxicating liquor, may be committed regardless of the driver's blood alcohol concentration. Rather, the state must prove the defendant, while driving a motor vehicle on a public way, lacked the clearness of intellect and control of himself that he would otherwise have. After reviewing the evidence in light most favorable to the verdict, the court concluded that the jury could reasonably have found the defendant was operating the vehicle while under the influence of intoxicating liquor.

PLEA RECOMMENDATION - WITHDRAWAL OF GUILTY PLEA

In *Bay v. State*, 2003 ND 183, ____ N.W.2d ____, the court affirmed the trial court's denial of his petition for post-conviction relief requesting the withdrawal of his guilty plea.

Bay entered a guilty plea, in the form of an Alford plea, to gross sexual imposition. After a presentence investigation, the trial court sentenced Bay to ten years imprisonment with five years suspended, and five years probation.

More than two years after he entered his guilty plea, Bay filed a petition for post-conviction relief to withdraw his guilty plea claiming that the trial court failed to inform him before acceptance of the plea that it was not required to accept the state's recommended sentence.

A defendant may not withdraw an accepted guilty plea unless withdrawal is necessary to correct a manifest injustice. A trial court's decision as to whether a manifest injustice exists necessitating a withdrawal of a guilty plea lies within its discretion and that decision will not be reversed on appeal absent an abuse of discretion.

Before a trial court accepts a guilty plea, it must advise the defendant of certain rights under North Dakota Rule of Criminal Procedure 11. Rule 11 does not require ritualistic compliance but substantial compliance. When a trial court fails to specifically ask if plea negotiations had taken place, Rule 11 is satisfied by clearly determining that the defendant understands the trial court is free to impose whatever sentence it feels is appropriate.

Bay agreed to change his plea of not guilty to gross sexual imposition to guilty, in exchange for a non-binding sentence recommendation. When accepting Bay's guilty plea, the court did not specifically ask Bay if the guilty plea was a result of plea negotiations with the state's attorney. However, the trial court personally addressed Bay and asked him if he understood the trial court was ultimately free to impose whatever sentence seemed appropriate and if he understood that the time the trial court would consider plea agreements had come and gone. Bay answered yes to both questions without any evidence of confusion or hesitation. Bay admitted in his brief in support of post-conviction relief that the state's attorney was only recommending a sentence. There was no evidence that Bay had been pressured or coerced to change to his plea to guilty.

The record established that the trial court determined that Bay knew it could impose whatever sentence it deemed appropriate and had substantially complied

with Rule 11. The trial court was not required to inform Bay that it was not accepting the state's attorney recommendation nor was it required to allow him to withdraw his guilty plea. A non-binding recommendation of sentence and a binding plea agreement under North Dakota Rule of Criminal Procedure 11 are significantly different. The state fulfills its obligation in a non-binding recommendation when it makes the recommendation. However, the trial court may impose a harsher sentence without allowing the defendant to withdraw the guilty plea.

LURING A MINOR BY COMPUTER – OUT-OF-STATE CONDUCT – LURING AND SEX OFFENDER REGISTRATION STATUTE CONSTITUTIONALITY

In *State v. Backlund*, 2003 ND 184, ____ N.W.2d ____, the court affirmed the defendant's conviction of luring a minor by computer.

The defendant, while in Minnesota, participated in an Internet chatroom with an individual with the screen name "Fargo babe22" who identified herself as a 14-year-old girl but was actually a male West Fargo police officer. The defendant solicited "Fargo babe22" to engage in a sexual act and offered to pick her up and bring her home when they were done. He arranged to meet with "Fargo babe22" at a convenience store in West Fargo. Police observed the defendant at the designated convenience store and he was arrested, admitting that he was the person who had been communicating with "Fargo babe22."

After entering a conditional plea of guilty, the defendant raised numerous jurisdictional and constitutional challenges to his prosecution.

The court first noted that N.D.C.C. § 12.1-20-05.1 does not explicitly specify that it is a strict liability offense and the required culpability for the conduct prescribed by that statute is "willfully." The court construed this section to provide that an adult is guilty of luring a minor by computer when (1) the adult knows the character and content of a communication that implicitly or explicitly discusses or depicts actual or simulated nudity, sexual acts, sexual contact, sadomasochistic abuse, or other sexual performances; (2) the adult willfully uses any computer communication system to initiate or engage in such communication with a person the adult believes to be a minor, and (3) by means of that communication, the adult willfully importunes, invites, or induces the person the adult believes to be a minor to engage in sexual acts or have sexual contact with the adult, or to engage in a sexual performance, obscene sexual performance, or sexual conduct, for the adult's benefit, satisfaction, lust, passions, or sexual desires.

The defendant argued that North Dakota lacked jurisdiction to prosecute him under this statute because he committed the offense at his computer in Moorhead, Minnesota. He claimed that North Dakota could not criminalize lawful Minnesota speech simply because one of the innumerable people able to access the Internet happens to be a North Dakota police officer. He argued that, if a crime is committed at all, it is at the keyboard and no further overt acts are required by the statute. Rejecting this claim, the court noted that N.D.C.C. § 29-03-01.1 provides that a person who, while outside this state, solicits criminal action within the state and is thereafter found in this state may be prosecuted under North Dakota law. The defendant importuned, invited, or induced "Fargo babe22" while he was at his computer in Moorhead and "Fargo babe22" received the communication at a computer in West Fargo. The defendant offered to pick up "Fargo babe22" at a designated convenience store in West Fargo. The police observed the defendant at the designated convenience store and he was then arrested in West Fargo. Under these circumstances, the court concluded that the language of N.D.C.C. § 29-03-01.1 applied to the defendant and he was subject to prosecution in North Dakota.

The defendant also asserted that the worldwide application of N.D.C.C. § 12.1-20-05.1 substantially impacts interstate commerce in violation of the "negative" or "dormant" aspect of the commerce clause of the United States Constitution. The commerce clause's affirmative act of authority to Congress to regulate interstate commerce has a "negative" or "dormant" aspect which prohibits a state from enacting legislation that unduly burdens interstate commerce.

Reviewing case law from other states, the court found it difficult to ascertain any legitimate commerce that is derived from the willful transmission of explicit or implicit sexual communications to a person believed to be a minor in order to willfully lure that person into sexual activity. N.D.C.C. § 12.1-20-05.1 does not violate the commerce clause.

In addition, the court rejected the defendant's arguments that this section violated the free speech provisions of the federal and state constitutions. The defendant argued that the provision was unconstitutionally overbroad as applied to this case because there was no communication to, or luring of a minor, and his communications were to a "virtual minor," a West Fargo police officer posing as a minor. The defendant argued that section 12.1-20-05.1 was a content-based restriction on free speech which is not narrowly tailored to effectuate his legislative purpose. Again reviewing federal and state decisions, the court agreed with those cases that concluded that recognized freedom of speech does not extend to speech used as

an integral part of conduct in violation of a valid criminal statute.

The First Amendment does not protect speech used in conjunction with the conduct of child solicitations. Section 12.1-20-05.1 is geared toward an adult's willful solicitation of sexual acts or sexual contact with a person believed to be a minor and North Dakota law separately prohibits sexual contact or sexual acts with a minor. Merely because the defendant's communications were transmitted to an adult does not negate his belief he was communicating with a minor, which is an aspect of the culpability defined by the statute. In addition, the statute affects only those who willfully target a person believed to be a minor and does not punish those who inadvertently speak with minors or who post messages for all Internet users, either adult or minors, to seek out or read at their discretion.

Section 12.1-20-05.1 prohibits the willful solicitation of a person believed to be a minor to engage a sexual act or sexual contact and does not authorize a criminal charged to be filed based upon "pure" speech. Rather, this statute is premised on criminalizing luring conduct and is a preemptive strike against sexual abuse of children by creating criminal liability for conduct directed toward the ultimate acts of abuse. N.D.C.C. § 12.1-20-05.1 does not violate the free speech provisions of the state and federal constitutions.

The defendant also objected to the sex offender registration and notification provisions of N.D.C.C. § 12.1-32-15 (2001 version) as punitive and violative of his due process and double jeopardy provisions of the federal and state constitutions. The defendant is subject to mandatory registration and his criminal conviction effectively provided him with procedural due process. Although the defendant raised a procedural due process argument in the trial court, he did not martial a separate substantive due process argument in that court. Other than conclusory claims that North Dakota's statutory scheme violates his substantive due process rights, the defendant had not developed a substantive due process challenge to N.D.C.C. § 12.1-32-15 in the Supreme Court. The court, therefore, did not address the merits of his argument that the registration notification provisions of that section violate his substantive due process rights.

The court did, however, reject the defendant's argument that the cumulative effect of the registration and notification requirements are punitive and violated double jeopardy.

The defendant was ordered to register as a sexual offender and subject to the notification requirements in the context of an original criminal sentence for violating section 12.1-20-05.1. The registration requirement was part-and-parcel of the conviction for the singular offense of luring a minor by computer and was not a separate proceeding. Those conditions are part of the sentencing scheme for his violation of section 12.1-20-05.1 and, although the ramifications for those conditions may be harsh, it is within the legislative prerogative to impose the conditions. Registration and notification provisions of N.D.C.C. § 12.1-32-15 do not violate the double jeopardy provisions of the state and federal constitutions.

SEARCH WARRANT – NEXUS BETWEEN PLACE TO BE SEARCH AND CONTRABAND SOUGHT – GOOD FAITH EXCEPTION TO EXCLUSIONARY RULE

In *State v. Dodson*, 2003 ND 187, ____ N.W.2d ___, the court affirmed the defendant's conviction of possessing methamphetamine paraphernalia and methamphetamine with intent to deliver.

A search warrant was issued for the defendant's residence at No. 23 Parkview Trailer Court. The search warrant affidavit described surveillance activity. A week before the search warrant was issued, a vehicle with a license number GLJ439 was observed at 541 Valley Street. The officers had information the vehicle was being used by an individual who was on probation in Williams County and was suspected of being involved in methamphetamine labs in the Williston area. Later that afternoon, a vehicle registered to another individual was also seen at the house. She had methamphetamine charges against her and had lived with another individual who had shown people in Williston and Minot how to manufacture methamphetamine. This individual had absconded after charges were brought against him.

The same vehicle was later seen at the defendant's trailer located at No. 23 Parkview Trailer Court. The officer stated that the defendant was known to be involved in the drug culture since 1991 and that one named individual stated that the defendant "does more than his share of buying and selling methamphetamine."

Two individuals were observed leaving No. 23 Parkview Trailer Court in the vehicle with the license GLJ439, and were followed to the Home of Economy store. One of the individuals left with a bag and returned to the vehicle that traveled back to the defendant's trailer. A clerk at Home of Economy told them a man who matched the description of one individual in the vehicle had bought a 32-ounce bottle of sulfuric acid (Mr. Plumber). Sulfuric acid can be used in the production of methamphetamine.

The next day a search was conducted of a garbage bag seized from the alley behind 541 Valley Street, and four tinfoil bindles with burn marks along with other items were found. An arrestee told officers that he and

another person were the main distributors of methamphetamine for occupants of that residence.

Four days later, another garbage bag taken from the alley behind the home was searched. It contained four empty packages of Equate Suphedrine and eight foils with burned residue. Suphedrine contains one of the main precursors for methamphetamine, and the amount found at one time is indicia of the manufacturing of methamphetamine.

Two days later there was a complaint from a resident in Parkview Trailer Court regarding heavy "come and go" traffic at the defendant's trailer between 2 and 4 a.m. Two days after that, a Home of Economy employee reported that the individual who purchased the Mr. Plumber earlier, had returned and purchased Naptha, which is another precursor to the manufacture of methamphetamine. The employee was shown the defendant's picture and the employee was "95% sure" that the individual was the defendant who had purchased the Naptha and Mr. Plumber. The employee gave the officer the license plate number of the vehicle the defendant was driving and described it as a 15-year-old vehicle. The defendant owned a 1987 Olds Cutlass with the license number one letter different than that provided by the employee.

Based upon this information, a search warrant was issued and the defendant was arrested as a result of the evidence seized during the search.

The defendant contended the evidence discovered while conducting the search should have been suppressed because there was no probable cause to issue the warrant. There must be a nexus between the place to be searched and the contraband sought. The search warrant affidavit provided information that the vehicle with the license number GLJ439 was located at 541 Valley Street and the defendant's trailer on the same day the defendant purchase sulfuric acid. In addition, the affidavit showed that there may have been drug activity and manufacturing at 541 Valley Street based upon garbage searches and other information. However, this information did not establish a sufficient nexus between No. 23 Parkview Trailer Court, the defendant's residence, and the contraband sought. Circumstantial evidence may establish the nexus between a place to be searched and the contraband sought. However, the fact that the vehicle with the license number GLJ439 was at 541 Valley Street and No. 23 Parkview Trailer Court on the same day, which was prior to any evidence of drug activity being discovered at 541 Valley Street, did not provide a sufficient link between the two locations from which conduct occurring at 541 Valley Street can cast a degree of suspicion upon No. 23 Parkveiw Trailer Court. Therefore, the evidence discovered during the garbage bag searches, the association of the evidence regarding certain individuals other than the defendant, and the information provided by the arrested informant, while creating suspicion of drug activity, do not together establish probable cause regarding No. 23 Parkview Trailer Court.

As a result, the court considered whether the other evidence provided in the Affidavit established probable cause to issue a search warrant for that premises. The court noted that no information was provided from which the magistrate could determine a named informant's reliability or the nature of intelligence reports regarding the drug activity by the defendant and others. The statements regarding the defendant's reputation, the intelligence reports, and the statement by the informant did not raise a significant degree of suspicion regarding the defendant. Suspicion that persons visiting premises are connected with criminal activity will not suffice for issuance of a warrant to search the premises. The visiting of premises by an individual person on probation and suspected to be involved in methamphetamine labs, when considered with the other minimal evidence of drug activity occurring at No. 23 Parkview Trailer Court, did not give rise to a significant degree of suspicion and was, at most, a very thin layer to be measured in the probable cause analysis.

The defendant also argued that the information regarding his purchase of Mr. Plumber and Naptha was not sufficient to establish probable cause because these were innocent items. The court recognized that the relevant inquiry is not whether the conduct is innocent or guilty but what degree of suspicion attaches to it. Mr. Plumber and Naptha have common legal uses. Each product can also be used in the process of manufacturing methamphetamine. Simultaneous purchase of innocent items could become suspicious under circumstances indicating the items will be used to manufacture drugs. However, the defendant purchased one 32-ounce bottle of Mr. Plumber and a container of Naptha. The information providing regarding the purchases did not cause a great deal of suspicion because there is minimal other evidence of drug activity occurring.

The information provided to the magistrate in this case was sufficient to cause suspicion and warrant further investigation. However, the combined layers did not establish probable cause to believe the contraband sought would be found in the places to be searched. The court concluded that there was no probable cause to issue the search warrant under the Fourth Amendment.

The trial court, however, found the good faith exception to the exclusionary rule as applying in this case. The defendant argued that the tenuous nature of the affidavit was not enough for an officer to objectively rely on it.

The basis of the good faith exception is that if an officer reasonably relies on a warrant in good faith, there is no police misconduct to deter. The exclusionary rule is not used to deter misconduct of judges or magistrates.

The defendant did not sufficiently raise an argument that the North Dakota Constitution precludes application of the good faith exception to the state's exclusionary rule, not withstanding its application under the federal constitution. Previously, the court has applied the good faith exception only in cases under N.D.C.C. § 19-03.1-32(3) which involves no-knock search warrants. The court did not decide whether it will adopt a good faith exception in this case where federal precedent controls because a state constitutional argument was not raised.

The court did apply the good faith exception to the exclusionary rule under the Fourth Amendment when evaluating the federal constitutional claim. If the court did not do so, it would be imposing greater restrictions on police activity when the United States Supreme Court specifically refrained from doing so in United States v. Leon, 468 U.S. 897 (1984). In addition, the court is required to apply the good faith exception to the exclusionary rule under the Fourth Amendment in the same manner as the federal courts apply it. The United States Supreme Court has expressed the importance of uniformity in federal law.

There is a strong preference for officers to obtain search warrants. In this case, the court has determined the information provided in the affidavit did not rise to the level of establishing probable cause to issue the search warrant. However, the information when taken in its entirety was not so lacking in indicia of probable cause that the officer could not reasonably rely on the judgment of the issuing magistrate. In this case, the officer sought approval of the search warrant from the neutral and detached magistrate. Relying on that magistrate's determination that the warrant established probable cause was not objectively unreasonable. The evidence was properly admitted under Leon because there was no police misconduct to deter.

I have enjoyed working with each of you this past year. My staff and I wish you and your families a safe, pleasant and happy holiday season.

Wayne Stenehjem